

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



WENJIU LIU,

Charging Party,

v.

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY (EAST BAY),

Respondent.

Case No. SF-CE-1009-H

PERB Order No. Ad-404-H

November 22, 2013

Appearances: Wenjiu Liu, on his own behalf; Dawn S. Theodora, University Counsel, for Trustees of the California State University (East Bay).

DECISION

This case is before the Public Employment Relations Board (PERB or Board) on a request under PERB Regulation 32155(d),¹ “Disqualification of Board Agent or Board Members” by Wenjiu Liu (Liu). Liu requests special permission to appeal a decision by an administrative law judge (ALJ) who refused to disqualify himself from adjudicating Case No. SF-CE-1009-H, in which Liu is the charging party. For reasons discussed more fully below, we summarily deny this request, as Liu’s initial request for disqualification did not comply with PERB Regulation 32155(c).

PROCEDURAL HISTORY

On April 2 to April 5, 2013, PERB conducted a formal hearing on a complaint against the Trustees of the California State University (East Bay) (CSU) that alleged CSU violated the Higher Education Employer-Employee Relations Act (HEERA)² by the manner in which it

¹ PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

² HEERA is codified at Government Code section 3560 et seq.

processed several of Liu's grievances. PERB's Chief ALJ presided over this hearing, which was the second formal hearing involving these litigants in which he served as ALJ.³

On June 20, 2013, approximately two-and-a-half months after the close of the formal hearing, Liu filed a sworn written request with the ALJ, asking that the ALJ recuse himself from further consideration in Case No. SF-CE-1009-H. Liu alleged that statements the ALJ made during the hearing on the merits of that case between April 2 to April 5, 2013, caused Liu to believe that the ALJ had pre-judged the case against Liu.

Because Liu did not serve his June 20, 2013 request on CSU, the ALJ forwarded it to CSU's counsel on June 24, 2013, and gave CSU 14 days to respond. CSU filed its opposition on July 8, 2013.

On July 9, 2013, the ALJ issued a written ruling denying Liu's request for recusal. On the same day, Liu filed with the Board itself a request for special permission to appeal the ALJ's ruling, based on PERB Regulation 32155(d).

ALJ'S DECISION

The ALJ initially noted that Liu's request for disqualification was late under PERB Regulation 32155(c), which provides, in pertinent part:

Any party may request the Board agent to disqualify himself . . . whenever it appears that it is probable that a fair and impartial hearing or investigation cannot be held by the Board agent to whom the matter is assigned. . . . The request must be made prior to the taking of any evidence in an evidentiary hearing or the actual commencement of any other proceeding.

(Emphasis added.) The ALJ noted that Liu's request was based on statements made during the April 2 to April 5, 2013, hearing in Case No. SF-CE-1009-H and that Liu did not make his request until nearly two-and-a-half months later.

³ The ALJ issued his proposed decision in Case No. SF-CE-995-H on May 8, 2013, dismissing the complaint against CSU.

Despite the untimeliness of the request, the ALJ addressed Liu's contentions on the merits, and concluded that there was no basis to support his recusal from the case.⁴

DISCUSSION

As noted above, PERB's procedure for requesting disqualification of a board agent quite specifically requires that the request for disqualification or recusal be filed prior to the taking of evidence in an evidentiary hearing. In this case, the evidentiary portion of the hearing occurred between April 2 to April 5, 2013. Yet Liu did not file his request for recusal until after the completion of the evidentiary hearing. He asserts that certain remarks made by the ALJ during the April 2 to April 5, 2013, hearing demonstrate the ALJ's alleged prejudice against him. Under the plain meaning of subdivision (c) of PERB Regulation 32155, a request to disqualify the ALJ is simply not available to Liu, because the request did not comply with the requirement that such requests must be made before the taking of any evidence. (*Regents of the University of California* (1987) PERB Decision No. 615-H.)

Subdivision (d) of PERB Regulation 32155 provides:

(d) If the Board agent does not disqualify himself or herself and withdraw from the proceeding, he or she shall so rule on the record, state the grounds for the ruling, and proceed with the hearing or investigation and the issuance of the decision. The party requesting the disqualification may, within ten days, file with the Board itself a request for special permission to appeal the ruling of the Board agent. If permission is not granted, the party requesting disqualification may file an appeal, after hearing or investigation and issuance of the decision, setting forth the grounds of the alleged disqualification along with any other exceptions to the decision on its merits.

Reading subdivisions (c) and (d) of PERB Regulation 32155 together, it is clear that the procedure was intended as a mechanism to disqualify a Board agent before that Board agent has undertaken proceedings based on any enumerated grounds for disqualification set forth in

⁴ Because we deny Liu's filing on procedural grounds, it is not necessary to discuss the ALJ's ruling on the merits of the recusal request.

subdivision (a), i.e., Board agent has a financial interest in the outcome of the case, Board agent is related to a party or attorney, etc. Although Liu's filing is styled as a "request for special permission," we cannot treat it as such because he did not request that the ALJ disqualify himself prior to the taking of evidence at the formal hearing. Therefore, we summarily deny Liu's filing because Liu's request for disqualification does not come within the purview of subdivision (c) as a threshold matter.

Where a claim of prejudice or bias by a Board agent does not arise until the evidentiary hearing itself, the appeal procedures set forth in subdivision (d) of PERB Regulation 32155 do not apply. Such is the case here. Liu's claim of prejudice by the ALJ is based on statements the ALJ made during, not prior to, the taking of evidence at the formal hearing.

The proposed decision in Case No. SF-CE-1009-H has not issued as of this date. If it is adverse to Liu, he may file exceptions to it, including an exception based on his claim that certain remarks made by the ALJ during the formal hearing demonstrate the ALJ's alleged prejudice against him. (*Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M, at pp. 23-24 [Board refused to reverse findings in ALJ's proposed decision based on district's claim that ALJ was biased, because district failed to alleged any evidence of bias other than the fact that the ALJ resolved factual questions contrary to its position].)

ORDER

Wenjiu Liu's filing in Case No. SF-CE-1009-H is SUMMARILY DENIED.

PER CURIAM